STATE OF MICHIGAN
SUPREME COURT

JEREMY DROUILLARD,

Plaintiff-Appellee

v.

AMERICAN ALTERNATIVE INSURANCE CORPORATION,

Defendant-Appellant.

Supreme Ct No. 157518
Court of Appeals No. 334977
LC Case No. 15-002282-NI
Hon. Michael L. West

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DEFENDANT - APPELLEE AMERICAN ALTERNATIVE INSURANCE CORPORATION'S RESPONSE BRIEF IN OPPOSITION TO PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL TO SUPREME COURT

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COUNTER- STATEMENT OF QUESTIONS INVOLVED

I. **DID THE COURT OF APPEALS PROPERLY DETERMINE THAT THE TRIAL COURT ERRED IN DENYING SUMMARY DISPOSITION BASED ON THE UNINSURED MOTORIST PROVISIONS REQUIRING AN OBJECT TO HIT THE INSURED VEHICLE?**

Plaintiff-Appellant Drouillard Answers:	"NO"
Defendant-Appellee AAIC Answers:	"YES"
Court of Appeals Answered:	"YES"
Trial Court Answered:	"DID NOT ADDRESS"

II. **DID THE COURT OF APPEALS PROPERLY DETERMINE THAT THE TRIAL COURT WAS CORRECT IN DENYING SUMMARY DISPOSITION BASED ON THE UNINSURED MOTORIST PROVISIONS REQUIRING A HIT AND RUN VEHICLE?**

Plaintiff-Appellant Drouillard Answers:	"YES"
Defendant-Appellee AAIC Answers:	"NO"
Court of Appeals Answered:	"YES"
Trial Court Answered:	"DID NOT ADDRESS"

RELIEF REQUESTED

Defendant-Appellee American Alternative Insurance Corporation (AAIC) respectfully requests that this Court **DENY** Plaintiff-Appellant's Application for Leave to Appeal, **AFFIRM** the Court of Appeals' February 27, 2018 decision, and remand for entry of Judgment in favor of AAIC. Alternatively, AAIC requests that this Court remand for entry of Judgment in favor of AAIC on the basis that no "hit and run" vehicle was involved.

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Introduction - At the time of the incident that is the subject of this action, Plaintiff was employed by Tri-Hospital EMS. He was riding as a passenger in a Tri-Hospital EMS ambulance. The ambulance was on route to a residence on the 14th block of Griswold.[1] The ambulance had turned westbound on Griswold from 10th Street and was traveling in the southern, westbound lane of travel.[2] The ambulance was being driven by Angelica Schoenberg and had accelerated to 45 mph at the time of the impact.[3]

At the intersection of Griswold and 13th Street the ambulance ran into a pile of construction materials. All witnesses have described the construction materials as a pile of drywall (as much as 2 feet high).[4] One witness claims that there were also two by fours between sections of drywall. The impact with the pile of construction materials apparently caused the ambulance to temporarily go airborne and to come down stopping suddenly on the front end. Plaintiff claims he sustained back injuries as a result of the impact. The damages sought are for those in excess of first party no-fault benefits that would be available in a third-party automobile action. The complaint alleges that an unidentified vehicle dropped the load of construction materials onto Griswold prior to the accident.

AIIC issued an insurance policy to Tri-Hospital EMS which contains uninsured

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[1]**Exhibit 1**, AAIC's Motion for Summary Disposition, Exhibit C, Schoenberg deposition, pp. 41-44.
[2]**Exhibit 1**, AAIC's Motion for Summary Disposition, Exhibit C, Schoenberg deposition, pp. 41-44.
[3]**Exhibit 4**, Plaintiff's Response to AAIC's Motion for Summary Disposition, Exhibit 7, Schoenberg deposition, p.26.
[4]It would need to be a high (and consequently, highly visible) pile in order to cause a heavy truck (the ambulance) to become airborne and come down hard impacting the front end of the vehicle as Plaintiff alleges.

motorists coverage. There is no dispute that if the coverage applies to this circumstance, Plaintiff would be a person that could receive benefits. However, in order for the coverage to apply, there must be an "uninsured motor vehicle" (under one of the definitions of "uninsured motor vehicle").

Procedural History

AAIC filed its motion for summary disposition on the basis that it does not owe uninsured motorist benefits based on the uninsured motorist provisions of its policy.[5] A hearing on the motion was held on August 8, 2016, with the Court ultimately denying AIIC's Motion for Summary Disposition.[6] The Trial Court issued its Order on September 9, 2016, denying AAIC's Motion for Summary Disposition.[7] AAIC timely filed its application for leave to appeal on September 27, 2016.

On February 23, 2017, the Court of Appeals granted AAIC's application for leave to appeal, limited to the issues raised in the application and supporting brief.[8] The parties filed briefs in accordance with the February 23, 2017 Order of the Court of Appeals. Oral argument was held in on February 6, 2018.[9] The Court issued its opinion and order on February 27, 2018. The Court held:[10]

> It is evident from the plain language of the policy language that coverage is not limited to instances involving direct, physical contact with the hit-and-run vehicle.

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[5]**Exhibit 1**, AAIC's Motion for Summary Disposition with Exhibits, **Exhibit 2**, AAIC's Reply to Plaintiff's Response with Exhibits
[6]**Exhibit 3**, August 8, 2016 Trial Court Hearing Transcript
[7]**Appendix A** -Trial Court Order entered September 9, 2016 denying AAIC's Motion for Summary Disposition
[8]**Appendix B**, Court of Appeals Order dated February 23, 2017 granting AAIC's Application for Leave to Appeal
[9]See Court Docket
[10]**Appendix C**, February 27, 2018 Court of Appeals Order and Opinion, p. 5 (Emphasis added).

> Instead, the policy states that "[t]he vehicle must hit, or cause an object to hit, an 'insured', a covered 'auto' or a vehicle an 'insured' is 'occupying[.]'" Thus, coverage would be afforded in this case despite the absence of physical contact between the ambulance and pickup truck, as long as the pickup truck "cause[d] an object to hit" the ambulance. According to AAIC, this condition was not satisfied because the unrefuted testimony demonstrated that the pickup truck did not cause the building materials to hit the ambulance; rather, the ambulance hit the stationary building materials. *We agree.*
>
> The construction of the relevant policy language reflects a clear distinction between the direct object and indirect object. Coverage is available under the policy only if the subject of the sentence (the "vehicle," meaning the hit-and-run vehicle), caused the direct object ("an object") to hit the indirect object ("an 'insured', a covered 'auto' or a vehicle an 'insured' is 'occupying'"). The order of the words in this sentence is grammatically distinct from the language that would be used to describe circumstances in which the hit-and-run vehicle caused the insured to hit an object. Interpreting the language at issue in a manner that would include those circumstances would require a "forced or constrained construction," which should be avoided.
>
> *Drouillard v. Am. Alt. Ins. Corp.* ___Mich App___;___NW 2d___(2018).

Plaintiff/Appellant timely filed its application for leave to this Court seeking review of the Court of Appeals decision.

The Insurance Policy.

AAIC issued "Michigan Uninsured Motorists Coverage" to Tri-Hospital EMS.[11] It is not contested that, as an occupant of the covered vehicle, Plaintiff is "an insured" (provided coverage is available under the complete terms of the form). The insuring agreement [A. Coverage 1.] reads in relevant part as follows:

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[11] **Exhibit 1**, AAIC's Motion for Summary Disposition, Exhibit A, uninsured motorist provisions.

> 1. We will pay all sums the "insured" is legally entitled to recover as compensatory damages from the owner or driver of an "uninsured motor vehicle". [All words and phrases that are within quotations are defined in the coverage form.]
>
> "Uninsured motor vehicle" is defined under [F. Additional Definitions 3a-d].[12]

Paragraph F. d of the coverage form reads, in relevant part, as follows:

As used in this endorsement:

> 3. "Uninsured motor vehicle" means a land motor vehicle or "trailer":
>
> * * * * *
>
> d. That is a hit and run vehicle and neither the driver nor owner can be identified. The vehicle must hit, or cause an object to hit, an "insured", a covered "auto" or a vehicle an "insured" is "occupying".

Underlying Accident

The incident took place on October 13, 2014 at approximately 8 pm.[13] On a run, Angelica Schoenberg was operating a Tri-Hospital EMS ambulance westbound on Griswold having turned left on Griswold from northbound 10th St. on route to the call on the 14th block of Griswold.[14] She did not see the pile of drywall in the road prior to impact. She testified at her deposition:[15]

Question. When did you first observe whatever it was in the road?

Answer. After ***I hit it***.

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[12]Paragraphs a-c involve known vehicles and operators who either have no insurance or have an inadequate insurance and are, consequently, inapplicable to this case.
[13]**Exhibit 1**, AAIC's Motion for Summary Disposition, Exhibit B, Police Report.
[14]**Exhibit 1**, AAIC's Motion for Summary Disposition, Exhibit C, Schoenberg deposition, pp. 41-44.
[15]**Exhibit 1**, AAIC's Motion for Summary Disposition, Exhibit C, Schoenberg deposition, pp. 45-46

Question. So you never saw it before hand?

Answer. No.

Question. After ***you hit it*** I presume you get out of the truck and you see what ***you hit***?

Answer. Yes.

Question. What did you observe as to what it was that ***you hit***?

Answer. Drywall.

Question. Can you describe it in any more detail to me. I know what drywall is but can you tell me dimensions can you tell me the pile, what it was like?

Answer. It was scattered all over Griswold.

Question. After ***you hit it***? (Emphasis added).

Answer. Yes. There was dust in pieces and debris everywhere.

Schoenberg also testified as follows:[16]

Question. You also agree with me, would you not, that whatever ***you hit*** in that road, it was a stationary object?

Answer. Yes.

* * * * *

Question. You don't take any issue with the statement I would make that ***you struck*** whatever was in the road there?

Answer. I do not take any issue with that.

Question. You agree with that?
Answer. **Yes.** (Emphasis added)

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[16]**Exhibit 1**, AAIC's Motion for Summary Disposition, Exhibit C, Schoenberg deposition, pp. 49-51

Ms. Schoenberg further testified:[17]

> Question. Did you ever ask Jeremy did he see what was in the road?
>
> Answer. No. We both said what did ***we just hit***.
>
> * * * * *
>
> Question. So he never indicated to you in any fashion that he saw anything in the road before ***you hit it*** or that he saw a truck?
>
> Answer. No.
>
> * * * * *
>
> THE WITNESS: To be clear, I did not see the drywall prior to ***hitting it***. (Emphasis added).

In response to Defendant's Request to Admit 4, Plaintiff has conceded that the drywall pile was stationary at the time of the impact:[18]

> **Request to Admit 4**: Please admit that the drywall or the object or objects was stationary in the roadway at the time of the impact.
>
> **ANSWER: Yes. I admit the drywall was stationary in the roadway at the time of the impact.**

Various bystanders have testified that a pickup truck or, alternatively a trailer on the back of truck accidentally dropped the drywall off the bed of a pickup truck or off a trailer being pulled by a truck, in the roadway. They have given varying accounts of when this occurred and what direction the truck headed after dropping the load of drywall. There is no dispute, however, from any witness that the pile of drywall was completely stationary in the roadway at the time of impact.

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[17]**Exhibit 4**, Plaintiff's Response to AAIC's Motion for Summary Disposition, Exhibit 7, Schoenberg deposition, p.26.

[18]**Exhibit 1**, AAIC's Motion for Summary Disposition, Exhibit D, Plaintiff's Answers to Requests for Admission.

Bystander Testimony

Neighborhood witness, Christopher Thompson testified as follows:[19]

> Question. What do you see next with regard to the ambulance that was driving down Griswold?
>
> Answer. I saw the ambulance *strike the pile*.

Another neighborhood witness, Stephen Duckworth, testified about the impact. While his observations were inconsistent with Mr. Thompson's in many respects, his characterization of what and who did the hitting was identical:[20]

> Answer. I don't remember if I told them about the pickup, I told them I seen the accident, I seen the drywall in the road and *the ambulance hit the drywall* and all that. I don't know for sure if I told them about the pickup truck. I believe I did.

Stephen Duckworth's girlfriend at the time, Calli Reniff, also claims she witnessed the impact. She stated:[21]

> Answer. Yes. Like I said, I barely seen the back of the truck clear the other side of 13th and *the ambulance was striking the drywall*.

LAW AND ARGUMENT

Standards for Insurance Policy Construction

"An insurance policy constitutes a contractual agreement between the insurer and the insured." *Zurich American Ins Co v. Amerisure Ins Co*, 215 Mich App 526, 530; 547 NW 2d 52(1996). *West American Ins Co v. Meridian Mut Ins Co*, 230 Mich App 305, 310; 583 NW 2d 548 (1998). If an insurance contract's language is clear, its construction is a

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[19]**Exhibit 2**, AAIC's Reply Brief in support of its Motion for Summary Disposition, Exhibit G, Thompson deposition, p. 18

[20]**Exhibit 2**, AAIC's Reply Brief in support of its Motion for Summary Disposition, Exhibit H, Duckworth deposition, p. 45

[21]**Exhibit 2**, AAIC's Reply Brief in support of its Motion for Summary Disposition, Exhibit I, Reniff deposition, pp. 23-24

question of law for the court. *Henderson v. State Farm Fire & Cas. Co.*,460 Mich 348, 353-55; 596 NW 2d 190(1999); *Taylor v. Blue Cross Blue Shield of Michigan*, 205 Mich App 644, 649; 517 NW 2d 864(1994)."A contract of insurance rests upon and is controlled by the same principles of law applicable to any other contract." *Bowen v Prudential Ins Co of America*, 178 Mich 63, 69; 144 NW 543 (1913); *Upjohn Co v. New Hampshire Ins Co.*, 438 Mich 97,207; 476 NW 2d 392 (1991); *Michigan Millers Mutual Ins Co v. Bronson Plating Co.*, 445 Mich 558,567; 519 NW 2d 864 (1994); *Wilkie v. Auto-Owners Ins. Co.*, 469 Mich 41, 51; 664 NW2d 776 (2003); *Twichel v. MIC General Ins. Corp.*, 469 Mich 524, 534; 676 NW 2d 616 (2004).

The interpretation of insurance policies is guided by a number of well-established principles of contract construction. Foremost among those is the maxim that an insurance **policy must be enforced in accordance with its terms**. *Twichel v. MIC General Ins. Corp.*, 469 Mich 524, 534; 676 NW 2d 616 (2004); *Wilkie v. Auto-Owners Ins. Co.*, 469 Mich 41, 51; 664 NW2d 776 (2003); *Michigan Millers Mutual Ins Co v. Bronson Plating Co.*, 445 Mich 558,567; 519 NW 2d 864 (1994); *Upjohn Co v. New Hampshire Ins Co.*, 438 Mich 97,207; 476 NW 2d 392 (1991).

"An insurance policy is similar to any other contractual agreement, and, thus, the court's role is to determine what the agreement was and effectuate the intent of the parties." *Hunt v Drielick*, 496 Mich 366, 372; 852 NW 2d 562 (2014) (quotation marks and citation omitted). This Court, has reiterated Michigan law that contracts, including insurance contracts, are to be enforced as written because an unambiguous contract reflects the parties' intent as a matter of law. *In re Smith Trust*, 480 Mich 19, 24; 745 NW 2d 754 (2008) relying on *Frankenmuth Mut. Ins. Co. v. Masters,* 460 Mich 105, 111, 595 NW 2d

832 (1999); see also *Rory v Continental Insurance Company*, 473 Mich 457, 461; 703 NW2d 23(2005). Insurance policies are contracts and, in the absence of an applicable statute, are subject to the same contract construction principles that apply to any other species of contract. *Titan Ins Co v Hyten*, 491 Mich 547, 554; 817 NW 2d 562 (2012) (citation and quotation marks omitted). **It is impossible to hold an insurer liable for a risk it did not assume**. *Twichel v. MIC General Ins. Corp.*, 469 Mich 524, 534; 676 NW 2d 616 (2004)(Emphasis added).

Uninsured motorist coverage is not a statutorily mandated coverage. Consequently, the terms of the contract control the claimant's entitlement to benefits. *Manzella v. State Farm Mut. Auto. Ins. Co.*, 480 Mich 1115; 745 NW 2d 770 (2008).

Under traditional principles of contract interpretation, "unless a contract provision violates law or one of its traditional defenses to the enforceability of a contract applies, a court must construe and apply unambiguous contract provisions as written." *Rory v Continental Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005).

In *Rory, supra*, at 465-466, this Court stated:

> Uninsured motorist insurance permits an injured motorist to obtain coverage from his or her own insurance company to the extent that a third-party claim would be permitted against the uninsured at-fault driver. Because Michigan's no-fault act does not require uninsured motorist coverage, the rights and limitations of such coverage are purely contractual and are construed without reference to the no-fault act.

This Court also noted in *Rory*:

> However, it is difficult to rationalize implementing the intent of the parties by imposing contractual provisions that are completely antithetic to the provisions contained in the contract. Rather, the intent of the contracting parties is best discerned by the language actually used in the contract. *Rory*, *supra*, at 489;703NW2d 23.

In *DeFrain v State Farm*, 491 Mich 359;817 NW 2d 504 (2012), this Court again made clear that for nonmandatory coverage (such as uninsured motorists coverage) a reviewing court is to apply the plain language of the policy to determine if coverage exists:

> The instant case requires us to interpret a policy for UM coverage issued by State Farm that includes a 30 day notice provision regarding hit and run motor vehicle claims. Because providing UM coverage is optional and not statutorily mandated under the no-fault act, ***the policy language alone controls*** the circumstances entitling a claimant to an award of benefits. (Emphasis added).

We construe contractual terms in context. *Henderson v State Farm Fire & Cas Co,* 460 Mich 348, 354; 596 NW 2d 190 (1990). We must interpret a contract in a way that gives every word, phrase, and clause meaning, and must avoid interpretations that render parts of the contract surplusage. *Klapp v United Ins Group Agency Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003).

It is established law in Michigan that a court is not to employ strained or unusual interpretations of simple language in order to find coverage. *Royce v Citizens Ins*, 219 Mich App 537, 542; 557 NW 2d 144 (1996); *Wilson v Home Owners Mutual Ins Co*, 148 Mich App 485, 490; 384 NW 2d 807 (1986); *Allstate Ins. Co. v. Miller*, 175 Mich App 515, 519; 438 NW 2d 638 (1989). The language of a contract is to be interpreted in accordance with the rules of grammar. *Pendill v Maas*, 97 Mich 215, 218; 56 NW 597 (1893). Thus, the language of a contract, like that of a statute, must be read and understood in its proper grammatical context. *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999). It is a general rule of grammar that a modifying clause is confined solely to the last antecedent, unless a contrary intent appears. *Id.*

ARGUMENT

Argument Summary

The terms of the policy require that a vehicle hit the insured vehicle or cause an object to hit the vehicle that the plaintiff is occupying. In this case, no vehicle hit or caused an object to hit the vehicle that the plaintiff was occupying. Rather, the vehicle that the Plaintiff was occupying hit or struck a stationary object (the pile of drywall). Because this accident does not qualify for coverage/benefits under the terms of the uninsured motorist coverage, the Court of Appeals was correct in reversal of the trial court and remanding for entry of summary disposition in favor of AAIC.

I. BASED ON THE POLICY LANGUAGE, WHERE THE INSURED VEHICLE HIT A STATIONARY OBJECT, THE COURT OF APPEALS PROPERLY REVERSED THE TRIAL COURT GRANTING SUMMARY DISPOSITION IN FAVOR OF AAIC.

A variety of different formulations have been used in insurance contracts to provide uninsured motorist coverage in cases of hit and run accidents. *McJimpson v Auto Club Group Ins Co*, 315 Mich App 353, 359; 889 NW 2d 724 (2016).

> Commonly, these policies require some sort of "physical contact" between the injured party's vehicle and the hit and run vehicle. See generally *Id.* at 359-360.
>
> * * * *
>
> The manner of physical contact required—that is, whether the hit and run vehicle must have direct physical contact with the injured party's vehicle, or whether contact can occur through an intermediate object—will depend on the wording of the specific policy. *Tucker v. Doe*, *supra.*, at 4-5 (Internal citations omitted).[22]

A. The Object Must Hit the Insured Vehicle and Not Vice Versa

In this case, no vehicle directly hit a covered vehicle that the insured was occupying.

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[22]**Exhibit 5**. *Tucker, supra.* is distinguishable because 1) the policy language is different than the AAIC policy language and 2) an intermediary vehicle was struck while moving and was forced into the insured vehicle in an unbroken chain of events.

The question then becomes did a hit and run vehicle cause an object to hit the covered vehicle? Even assuming there is some relation between the unidentified vehicle and the drywall in the road, the drywall did not hit the covered auto, rather the covered auto hit the drywall. Because no object hit the ambulance, there is no coverage.

The policy language is clear and unambiguous in providing coverage only where an object is propelled from or by the "hit and run" vehicle. An example is where a rock is thrown from the vehicle or the "hit and run" vehicle hits an object which then is propelled and strikes the insured vehicle.[23] These are circumstances where an *object that is in motion comes in contact with the insured vehicle.* Where the object which comes in contact with the insured vehicle is completely stationary (as in this case), the moving vehicle hits the stationary object, not vice versa.

This is consistent with rules of contract construction that the language of a contract is to be interpreted in accordance with the rules of grammar. *Pendill v Maas*, 97 Mich 215, 218; 56 NW 597 (1893). The language of a contract, like that of a statute, must be read and understood in its proper grammatical context. *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999). It is a general rule of grammar that a modifying word or clause is confined solely to the last antecedent, unless a contrary intention appears. *Id.*[24]

This exact issue was addressed by the Court of Appeals in the unpublished case of *Seger v Hartford Insurance* Company[25]. In *Seger, supra.*, a vehicle and driver that could

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[23]As an example, see *Hill v Citizens Ins Co of America*, 157 Mich App 383; 403 NW 2d 147 (1987). The parties stipulated that a rock which was propelled by a passing camper came through the windshield striking the Plaintiff.

[24]See also **Exhibit 6**, *Fifth Third Mortg.-Mi v. Hance*, Court of Appeals, September 29, 2011 Docket Nos. 294633, 294698.

[25]**Exhibit 1**, AAIC's Motion for Summary Disposition, Exhibit F, *Seger v Hartford Insurance Company*, Court of Appeals, February 26, 2008, Docket No. 274572.

not be identified allegedly caused the insured to swerve off the road causing the insured to hit a tree. The insured sought coverage under an uninsured motorists policy which contained language identical to the one at issue. In analyzing this identical language, the Court of Appeals in *Seger* stated:

> Taken together, these provisions set forth two possible situations for coverage: (1) where there is vehicle to vehicle contact (direct physical contact); or (2) where a vehicle causes an object to hit the insured vehicle (no direct physical contact between the vehicles).

Finding that there was no coverage, the Court of Appeals stated:

> The language of the policy is clear that, where there is no direct physical contact with the so-called hit and run vehicle, coverage is dependent on whether the vehicle caused an object hit the insured party. That condition was not met in this case. In considering policy language, word order of a sentence establishes a clear distinction between the direct object and the indirect object. Accordingly, the provision at issue provides coverage where the subject, the "hit and run vehicle whose owner or operator cannot be identified," causes the direct object, "an object," to hit the indirect object, the insured. This is grammatically distinct from describing a situation where the subject driver causes the insured to hit an object. Moreover, the grammar of direct and indirect objects reflects a commonsense understanding of causation . . . . For plaintiff to have uninsured motorist coverage under her policy, an uninsured vehicle must cause an object to hit plaintiff's vehicle, and not vice versa. Plaintiff may be able to prove that the unidentified vehicle caused her to hit a tree, but she cannot reasonably maintain that the unidentified vehicle caused the tree to hit her. Consequently, plaintiff has no coverage under her policy.

This Court denied plaintiff's application for leave to appeal from the Court of Appeals' finding in favor of Hartford. *Seger v Hartford Insurance Company*, 482 Mich 880; 752 NW 2d 469 (2008).

While the *Seger* decision is unpublished, *Seger* is instructive as the only appellate court decision in Michigan which directly addresses the argument raised by AAIC in this case- that being how to apply policy language which requires an object to hit the insured

vehicle. *Seger* is also consistent with contract construction rules requiring that a contract be interpreted in accordance with the rules of grammar. *Seger* found that the word order of a sentence establishes a clear distinction between the direct object and the indirect object. The analysis is clear, cogent and persuasive. The *Seger* decision is consistent with this Court's decisions on how to apply policy language and specifically, uninsured motorist coverage (an optional coverage controlled exclusively by the contract language).

In *Arthur and Carole Lang. v. Auto-Owners Ins. Co.*,[26] the Court of Appeals recently restated the principal that uninsured motorist coverage is not statutorily mandated, but is determined solely by the policy language. The Court of Appeals also found that the "physical contact" requirement does not violate public policy. The *Lang* Court stated:[27]

> According to our Supreme Court, "[t]he public policy of Michigan is not merely the equivalent of the personal preferences of a majority of this Court; rather, such policy must be clearly rooted in the law. There is no other proper means of ascertaining what constitutes our public policy." *Id.* at 67 (emphasis in original).
>
> The Court of Appeals further rejected the "Ohio corroborative evidence test":[28]
>
> As a Court we are not empowered to dispense with the contractually agreed upon physical contact requirement and to instead adopt for the parties Ohio's "corroborative evidence" test. *Id.* at 461.
>
> * * * *
>
> That Michigan enforces contractual "physical contact" requirements, as opposed to Ohio's "corroborative evidence" test, does not mean that the Michigan approach is against public policy, as there is no indication that the Ohio "corroborative evidence" test has ever been adopted through the various legal processes in Michigan or that it is "reflected in our state and federal constitutions, our statutes, and the common law." *Terrien*, 467 Mich

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[26]**Exhibit 7**, *Arthur and Carole Lang. v. Auto-Owners Ins. Co.*, (Unpublished, Mich. Ct. App. Docket No. 329577, issued January 17, 2017), Slip Opinion

[27]**Exhibit 7**, pp. 3-4.

[28]**Exhibit 7**, pp. 3-4. The Ohio "corroborative evidence test" allows claims of independent third-party testimony regarding the negligence of an unidentified vehicle.

at 66-67. Michigan policy does, however, favor the enforcement of otherwise valid contractual agreements. *Rory*, 473 Mich at 461-465.

Lang, supra., addressed whether a claimant was entitled to uninsured motorist coverage.[29] The Court refused to rewrite the contract to insert a "judicially created test" from another jurisdiction into the policy provisions. The holding is consistent with this Court's directives to avoid such temptation and is directly on point with AAIC's position that it does not owe uninsured motorist coverage.

No reasonable person would describe this circumstance as the pile of drywall hitting the ambulance. Rather, as Ms. Schoenberg, the ambulance driver, and all of the witnesses, unambiguously described it, she hit the drywall. Under *Rory, supra., DeFrain, supra.* and *Titan, supra.*, cases, this mandates a finding of no coverage.

In the lower courts, Plaintiff relied on a series of outdated decisions and legal standards (in light of *Rory, DeFrain* and *Titan*) to support its opposition to summary disposition in favor of AAIC.[30] These cases, do not, under current law, support a denial of summary disposition. Many of them contain policy language different then the language in the instant case. Second, with the exception of one case decided after *Rory*, all were decided before the decisions of this Court in *Rory, DeFrain* and *Titan*. Third, none of them applies the standards mandated in *Rory, DeFrain* and *Titan*. Finally, none of them address the issue in this case-does the policy language require that an object hit the insured vehicle as opposed to the insured vehicle hitting a stationary object?

The application of "special rules" applied only to insurance contracts was rejected by this Court in *Rory*. Additionally, it is precisely the same type of rule that was rejected

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[29]**Exhibit 7**.
[30]**Exhibit 4**, Plaintiff's Response to AAIC's Motion for Summary Disposition

by this Court in *DeFrain,* specifically for uninsured motorists coverage. Prior to *DeFrain*, Michigan Courts had developed a "special rule" that in order to enforce a 30-day notice requirement for hit and run accidents, the insurer must also show that the insurer was prejudiced by the violation of the notice requirement. Because it does not appear in the policy language, this Court held that there was no prejudice requirement.

The simple question to be answered in this case is-do the facts support coverage under a plain reading of the policy? Under common use of the language, no reasonable person could state that the drywall hit the ambulance as opposed to the ambulance hitting the drywall. This is irrespective of the amount of time prior to the incident that the drywall was deposited in the street. It doesn't matter if it was 30 seconds or 30 hours or 30 days. The drywall was not in motion and therefore did not hit the ambulance but rather the ambulance hit the drywall.

The courts in Michigan have uniformly held that a court may not apply a strained interpretation or construction of policy language in order to find an ambiguity so as to avoid the application of language, *Nesbitt v American Comm Mut Ins Co*, 236 Mich App 215, 222; 600 NW 2d 427 (1999) (internal quotation marks and citation omitted), and such constructions are to be avoided, *Royce v Citizens Ins Co*, 219 Mich App 537, 542; 557 NW 2d 144 (1996); *Upjohn Co v. New Hampshire Ins Co*, 438 Mich 197,208, n 8; 476 NW 2d 392 (1991). See also *Seger, supra.*

Semantics is a study of meaning, particularly the meaning communicated in language. It is usually thought of as a branch of linguistics. In this sense, semantics has much to give jurisprudence, for instance, in the study of criteria for meaning and the structure of relationships among related words.

After describing what happened in this incident, both a Harvard professor of linguistics and an illiterate would describe the incident the same way - the ambulance hit the pile of dry wall. No native speaker of English would describe the incident as the stationary pile of drywall hit or struck the ambulance. All of the testimony in this case describes the incident as the ambulance striking the drywall. The ambulance driver clearly describes the incident as the ambulance she was driving hit or struck the drywall. Each and every witness to this incident has described it the same way. No one has, could or would say that the pile of drywall struck or hit the ambulance.[31]

Accordingly, based on the facts and the unambiguous policy language, the Court of Appeals properly determined that Plaintiff was not entitled to uninsured motorist coverage under the AAIC policy.

B. "Substantial Physical Nexus" Requirement Must Be Rejected

The policy language does not contain the term "substantial physical nexus" nor any equivalent as a substitute for the physical contact that is actually required.[32] Consequently, the line of cases from the Court of Appeals that use "substantial physical nexus" as an alternative or equivalent to actual physical contact should be rejected by this Court. This Court has been clear throughout its history that the Court is to avoid engrafting language into an unambiguous contract under the guise of interpretation.

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[31]The dissenting opinion in the Court of Appeals concedes that in *Dancey*, the insured vehicle "hit the ladder in a roadway". This contradicts the dissent's conclusion that the building materials "hit" ambulance. **Appendix C**, February 27, 2018 Court of Appeals Order and Opinion, Dissenting Opinion

[32]Under the standards for a motion for summary disposition, it is recognized that the facts must be viewed in the most favorable light to the opposing party. Even recognizing this standard, there is no basis for inclusion of the concept of substantial physical nexus to be inserted into the policy language.

The rules for construction of a contract require the Court to "reject the temptation to rewrite plain and unambiguous meaning of the policy under the guise of interpretation. Rather, we enforce the terms of the contract as written." *Eghotz v. Creech*, 365 Mich 527,530; 113 NW 2d 815 (1962); *Stine v. Continental Casualty Co*, 419 Mich 89, 114; 349 NW 2d 127 (1984)." *Allstate Insurance Co. v. Freeman*, 432 Mich 656,666; 443 NW 2d 734 (1989). See also *Rory, supra*. and *DeFrain, supra*.

In reviewing the historical development of interpretation of uninsured motorist case law, none of the policy language used "substantial physical nexus" as a substitution for physical contact.

The first introduction of "substantial physical nexus" appeared in *Kersten v Detroit Auto Inter-Insurance Exch*, 82 Mich App 459, 474; 267 NW 2d 425 (1978).[33] The injured driver hit a tire and rim assembly laying in the passing lane on the highway. In *Kersten*, the Court found the chain of causation too speculative and reversed the circuit court's ruling that the accident was covered by the uninsured motorist provision of defendant's policy.

In *Hill v Citizens Ins Co of America*, 157 Mich App 383, 394; 403 NW 2d 147 (1987), the Court of Appeals reviewed a broad range of cases and concluded that "the 'physical contact' provision in uninsured motor vehicle coverage may be satisfied even though there is no direct contact between the disappearing vehicle and claimant or claimant's vehicle" provided that there is a sufficient causal connection between the disappearing vehicle and

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[33]Relying on other jurisdictions decisions, the *Kersten* Court required that there be a direct causal connection between the hit-and-run vehicle and the plaintiff's vehicle, and that the connection be carried through to the plaintiff's vehicle by a continuous and contemporaneously transmitted force from the hit-and-run vehicle. *Id.,* 82 Mich App at 471. There must be "clearly definable or objective evidence (rather than inferential evidence) of a link between a disappearing vehicle and plaintiff's vehicle." *Id.*, 82 Mich App at 472.

the striking object.[34]

This was also the basis for the Court of Appeals ruling in *Berry v State Farm Mut Auto Ins Co*, 219 Mich App 340, 347; 556 NW 2d 207 (1996). The policy in *Berry* required "physical contact," which, the Court of Appeals interpreted as providing coverage where there was either direct or indirect contact:[35]

> [T]his Court has construed the physical contact requirement broadly to include indirect physical contact, such as where a rock is thrown or an object is cast off by the hit-and-run vehicle, as long as a substantial physical nexus between the disappearing vehicle and the object cast off or struck is established by the proofs. *Id.*

The Court of Appeals focused on the presence of a "substantial physical nexus" in *Wills v State Farm Ins Co*, 222 Mich App 110, 115; 564 NW 2d 488 (1997). In *Wills*, the Court of Appeals stated that "indirect physical contact" involves situations when an object

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[34]The policy language in *Hill* was considerably different than the language in the AAIC policy. The *Hill* policy used the following language to define a hit and run vehicle:

> 3. "Hit-and-Run Automobile" means an automobile which causes bodily injury to an Assured arising out of physical contact of such automobile with the Assured or with an automobile which the Assured is occupying at the time of the accident . . . .

The phrase arising out of physical contact is much broader than the language of the AAIC policy at issue.

[35]The *Berry* Court neglected to apply proper rules of contract construction which require interpretation using the rules of grammar. The policy definition read:

> The policy defines "uninsured motor vehicle," in relevant part, as
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> a "hit-and-run" land motor vehicle whose owner or driver remains unknown and <u>*which strikes*</u>:
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> * * * *
>
> b. the vehicle the insured is occupying and causes bodily injury to the insured. (Emphasis added).

Under the rules of grammar, the Court reversed the requirement that the unknown vehicle was required to strike the insured vehicle which is contrary to the rules of policy construction.

is "cast off" by a vehicle:

> An uninsured motorist policy's requirement of "physical contact" between a hit-and-run vehicle and the insured or the insured's vehicle is enforceable in Michigan. The Court of Appeals has construed the physical contact requirement broadly to include indirect physical contact as long as a substantial physical nexus exists between the unidentified vehicle and the object cast off by that vehicle or the object that strikes the insured's vehicle.
>
> A "substantial physical nexus" between the unidentified vehicle and the object causing the injury to the insured has been found where the object in question was a piece of, or projected by, the unidentified vehicle, but not where the object originates from an occupant of an unidentified vehicle. *Id.* (citations omitted).

The *Wills* Court ultimately held that no uninsured motorist coverage was owed because the shots fired from the unidentified vehicle did not constitute actual physical contact between the two vehicles.[36]

The Court of Appeals has interpreted the language in insurance contracts requiring "physical contact" broadly to include indirect physical contact. *Berry v State Farm Mutual Automobile Ins Co*, 219 Mich App 340, 347; 556 NW 2d 207 (1996); *Wills v State Farm Ins Co*, 222 Mich App 110, 115; 564 NW 2d 488 (1997); *Adams v Zajac*, 110 Mich App 522, 527; 313 NW 2d 347 (1981).

Adams v Zajac, 110 Mich App 522; 313 NW 2d 347 (1981), *Hill v Citizens Ins Co of America*, 157 Mich App 383; 403 NW 2d 147 (1987); and *Berry v State Farm Auto Ins*, 219 Mich App 340; 556 NW 2d 207 (1996), relied on the court invented requirement that there must be a substantial physical nexus between a "disappearing vehicle" and the object struck to satisfy the "physical contact" requirement of the uninsured motorist insurance coverage. *Adams*, 110 Mich App at 529; *Hill*, 157 Mich App at 393-394; *Berry*,

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[36]The insured vehicle swerved and lost control, striking two trees.

219 Mich App at 347-352. *Adams* and *Berry* allowed the use of "inferential evidence," with evidence of an actual "disappearing vehicle."

As far back as 2002, the concurring opinion in *Prough v. Farm Bureau Gen. Ins. Co.*[37] recognized the problem with the manner in which the various panels were construing the uninsured motorist coverage provisions:

> However, I would further conclude that *Berry* was improperly decided...
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> * * * *
>
> Our Court noted already in *Kersten v Detroit Auto Inter-Insurance Exch*, 82 Mich App 459, 474; 267 NW 2d 425 (1978) that the term "physical contact has been stretched to include situations where no direct contact occurs." This is ludicrous; if there is no "direct contact" there is simply no "physical contact". In other words, the concept of "physical contact" has been "stretched" into meaninglessness.
>
> In the present case, the facts are simple and straightforward. There was no physical contact. Under the terms of the contract the parties entered into there is, thus, no coverage. The parties did not agree that coverage would apply if there was some "substantial nexus" or "casual connection" between the two vehicles. Except for *Berry*, the simple language of the parties' agreement would require summary disposition in favor of defendant, not plaintiff.

Despite being decided prior to the above statement, the *Prough* concurring opinion followed the following edict: "Statutory--or contractual--language must be enforced according to its plain meaning, and cannot be revised or amended to harmonize with the prevailing policy whims of members of this Court." *McDonald v. Farm Bureau Ins. Co*, 480 Mich 191, 198, 747 NW2d 811, 816 (2008)(internal citations omitted).

The majority of cases relied on by Plaintiff in the lower courts apply a standard that should be rejected. Those decisions rely on a standard not contained in the contract

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[37]**Exhibit 8**, *Prough v. Farm Bureau Gen. Ins. Co.,* Court of Appeals, July 12, 2002, Docket No. 229490, lv. den'd 469 Mich 946; 671 NW 2d 53(2003). The concurring judge stated that he was affirming because he was constrained to do so by the prior Court of Appeals decision in *Berry v State Farm Auto Ins*, 219 Mich App 340; 556 NW 2d 207 (1996).

language that standard being that as long as there is a "substantial physical nexus" between the hit and run vehicle and the insured vehicle collision, there is coverage. Regardless of whether the Courts determined that uninsured motorist coverage was available or not, any use of the requirement that there must be a substantial physical nexus is a judicially invented requirement inserted into the policy language.

Notably, many of the cases using "substantial physical nexus" were decided before *Rory, supra, DeFrain, supra* and *Titan, supra*. There is no way to reconcile the "substantial physical nexus" analysis with the decisions from this Court. This Court has made it very clear that the courts cannot introduce requirements or limitations that do not appear in the contract. In *DeFrain*, this Court held that where there is any discrepancy between a Court of Appeals decision and a decision of this Court, a lower court must apply this Court's rulings and reject any contrary rulings from the Court of Appeals. *DeFrain*, *supra*. 362.

Plaintiff's reliance on the recent decision in *McJimpson v. Auto Club Grp. Ins. Co.*, 315 Mich App 353, 361, 889 NW 2d 724, 728 (2016) is also misplaced. First, the policy language in *McJimpson, supra.* is not the same as the language in the AAIC policy. *McJimpson, supra.* actually supports AAIC's position in that the Court of Appeals enforced the policy language *as written* rather than imposing additional requirements into the contract.[38]

Further, Plaintiff's reliance on *Bahri v. IDS Property Casualty Ins. Co.*, 308 Mich App 420; 864 NW 2d 609(2014) is misplaced. Plaintiff's argument mis-characterized the discussion regarding uninsured motorist as the holding of the case. The actual holding in

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[38]The Court held that no uninsured motorist coverage was owed where the plaintiff was struck by a piece of metal that flew off a truck driving ahead of her on the highway.

Bahri, supra. is based on the determination that the policyholder committed fraud. Any discussion about the applicability of uninsured motorist coverage is not the holding in *Bahri, supra.,* but rather dicta. The Court specifically noted that the only appealing party, the intervening plaintiff, only sought recovery for PIP benefits in their complaint and did not seek any recovery for uninsured motorists benefits.[39]

C. *Dancey v Travelers* Does Not Address the Argument Raised By AAIC.

The Court of Appeals reversed the Trial Court's finding that it (the Trial Court) was bound by *Dancey v Travelers*, 288 Mich App 1; 792 NW 2d 372 (2010).[40] The Trial Court stated:[41]

> After looking at it further I do think that the accident part of it, at least the striking part of the drywall and how it got there and all of that and policy language is a situation that is controlled by *Dancey*. So, I am going to follow that reasoning in denying the Motion for Summary Disposition.

The Court of Appeals addressed the lower court's reliance on *Dancey* finding that the case was not controlled by *Dancey*:[42]

> Although *Dancey* involved the same policy language and substantially similar facts, it did not turn on the same issue—i.e., how to give effect to the language requiring that the hit-and-run vehicle "cause an object to hit" the insured, an insured vehicle, or a vehicle occupied by an insured. Therefore, *Dancey* was not dispositive of the issue raised by AAIC.

The Court of Appeals held that *Dancey, supra.* does not address the issues raised by AAIC and, consequently, provides no guidance. Consequently, *Dancey* does not

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[39]The Court also noted admitted specific facts of the circumstances in which the Plaintiff had no physical contact (direct or indirect) with the other vehicle.
[40]**Exhibit 3**, August 8, 2016 Trial Court Hearing Transcript, p. 13. *Dancey* was decided after *Rory* but before *DeFrain* and *Titan* but the decision makes no reference to *Rory* or its mandates.
[41]**Exhibit 3**, August 8, 2016 Trial Court Hearing Transcript, p. 13.
[42]**Appendix C**, February 27, 2018 Court of Appeals Order and Opinion, p. 5

provide support for a denial of summary disposition.

The argument by the dissent that implicit in the ruling in *Dancey* was that it supported plaintiff's position. The dissent is incorrect in its conclusion. The *Dancey* Court merely held that the trial court was correct in denying the motion for summary disposition on the basis of a factual question regarding the substantial physical nexus argument. The *Dancey* panel never held that there was uninsured motorist coverage, it only held that summary disposition in favor of the insurer on the single question presented was unwarranted.

II. WHERE THERE IS NO EVIDENCE THAT A HIT AND RUN VEHICLE CAUSED AN OBJECT TO HIT THE INSURED VEHICLE, THERE IS NO COVERAGE

In order for coverage to be available, there must be an "uninsured motor vehicle" as defined in the policy. The relevant policy language is:

> 3. "Uninsured motor vehicle" means a land motor vehicle or "trailer":
> * * * * *
> d. That is a hit and run vehicle and neither the driver nor owner can be identified. The vehicle must hit, or cause an object to a hit, an "insured", a covered "auto" or a vehicle an "insured" is "occupying".

The foregoing policy language has several limitations which define whether a vehicle is an "uninsured motor vehicle".The Court of Appeals majority opinion did not find it necessary to define or determine whether "hit and run vehicle" requires knowledge of the accident and like the trial court did not decide this issue.[43]

Appellate Courts are empowered to fashion "further or different relief". Such

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[43]**Appendix C**, February 27, 2018 Court of Appeals Opinion and Order, p. 3

empowerment requires that the Appellate Court have all the facts necessary for an issue's resolution presented. *Smith v. Foerster-Bolser Const., Inc.*, 269 Mich App 424; 711 NW 2d 421(2006). Appellate Courts will consider an issue that was not decided by trial court if the issue is one of law and the record is factually sufficient. *Steward v. Panek*, 251 Mich App 546, 554, 652 NW 2d 232 (2002); *American Nat. Fire Ins. Co. v. Frankenmuth Mut. Ins. Co.*,191 Mich App 202; 501 NW 2d 237(1993).

Where a trial court rule does not directly rule on an issue, the appellate courts have the ability and judicial power to review a question. ...[W]e will review the issue because it is a question of law, the necessary underlying facts have been presented, and its resolution is essential to the question presented on appeal. See *Atkinson v Detroit*, 222 Mich App 7, 11; 564 NW 2d 473 (1997); *Carson Fischer Potts & Hyman v Hyman*, 220 Mich App 116, 119; 559 NW 2d 54 (1996). In re Worker's Compensation Lien (Ramsey v Kohl), 231 Mich App 556, 560; 591 NW 2d 221 (1998).

Here, "the proper interpretation of contracts and the legal effect of contractual provisions are questions of law for the Court." *DeFrain, supra.* at 366-367; 817 NW 2d 504 (2012). While the Court of Appeals determined that it was not necessary to determine the threshold question of whether a "hit and run vehicle" was involved, this Court may address the basic premise under the policy language- what is a "hit and run" vehicle?

A. A Hit and Run Vehicle Must Be Involved

The policy requires, as a threshold for coverage, that there be a "hit and run vehicle". The uninsured motorist endorsement does not define "hit and run" vehicle. The

fact that a policy does not define a term does not render the policy ambiguous.[44] "The plain meaning of a word or phrase should not be perverted or that a word or phrase, the meaning of which is well-recognized, should [not] be given some alien construction merely for the purpose of benefitting an insured." *Upjohn Co v. New Hampshire Ins Co*, 438 Mich 197,208, n 8; 476 NW 2d 392 (1991). "... [W]hen faced with plain English phrases in an insurance contract, any attempt to define each element, or word, of the phrase... will almost invariably result in an inaccurate understanding of the phrase. Rather, the proper approach is to read the phrase as a whole, giving the phrase its commonly understood meaning. *Group Ins Co of Michigan v. Czopek* 440 Mich 590,596; 489 NW 2d 444 (1992). This requires a court to give contextual meaning to the phrase to determine what the phrase conveys to those familiar with our language and its contemporary usage. Thus, when the meaning of a colloquial phrase is in dispute, the court must not mechanistically parse the meaning of each word in the phrase; instead it must look to the contextual understanding and consider the phrase as a whole." *Henderson v. State Farm Fire and Casualty Co*, 460 Mich 348,356-357; 596 NW 2d 190 (1999).

The universal, common use of the term "hit and run" driver means that the driver of the vehicle was aware of the impact/collision and left the scene (ran) intentionally to avoid the consequences. This is not only the universal, common use of the term but, is codified in Michigan. MCL 257.617, MCL 257.618 and MCL 257.619 all begin with the following

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[44]The fact that a policy does not define a relevant term does not render the policy ambiguous. *Citizens Ins Co v Pro-Seal Serv Group, Inc*, 477 Mich 75, 82-83; 730 NW 2d 682 (2007); *Henderson v. State Farm Fire and Casualty Co*, 460 Mich 348,354; 596 NW 2d 190 (1999), *citing Auto Club Group Ins Co v. Marzonie* 447 Mich 624, 631;527 NW 2d 760(1994). Rather, an undefined term is accorded its commonly understood meaning. *Twichell v. MIC General Insurance Corp.*, 469 Mich 524, 534;676 NW 2d 616 (2004).

language: "The driver of a vehicle who knows or has reason to believe that he or she has been involved in an accident . . . ."

Michigan case law also requires that before someone can be in violation of the hit and run statutes that they must know that they have been involved in an accident. *People v Lepler*, 315 Mich 490; 24 NW 2d 190 (1946). While it is true that the statutory definition does not, by itself, control the interpretation of the policy language, it is consistent with the common understanding of the term "hit and run" driver.

B. Bystander Testimony Cannot Create a "Hit and Run" Vehicle.

The Court of Appeals was in error in agreeing that there was a question of fact on the question of whether the driver of the alleged pick-up truck knew he/she was in an accident. A basic requirement of reliable testimony is that the statements must be made from personal knowledge. *SSC Associates Ltd. Partnership v. General Retirement System of the City of Detroit,* 192 Mich App 360, 364;480 NW 2d 275(1991) relying on *Durant v. Stahlin*, 375 Mich 628, 135 NW 2d 392 (1965). Opinions, conclusionary denials, unsworn averments, and inadmissible hearsay do not satisfy the court rule; disputed fact (or the lack of it) must be established by admissible evidence. *Remes v. Duby (After Remand),* 87 Mich App 534, 537;274 NW 2d 64 (1978).

This Court cannot accept witness speculation as determinative of what another person (in this case, the purported driver of the pick up truck) knew or did not know. This is not permissible for several reasons, first and foremost, that "inferences must have support in the record and cannot be arrived at by mere speculation," *People v Plummer*, 229 Mich App 293, 301; 581 NW2d 753 (1998). "Speculation and conjecture are

insufficient to create an issue of material fact." *Ghaffari v Turner Const Co*, 268 Mich App 460, 464; 708 NW 2d 448 (2005); *Martin v Ledingham*, 282 Mich App 158, 161; 774 NW 2d 328 (2009); *Andrews v K Mart Corp*, 181 Mich App 666; 450 NW 2d 27 (1989).

Moreover, the concurring opinion in the Court of Appeals addressed a flaw in the *Dancey, supra*. opinion and Plaintiff's basic position by pointing out the temporal element required for a vehicle to be a "hit and run vehicle":[45]

> Regardless of whether the phrase "hit-and-run" imposes some requirement of knowledge on the part of the driver, its very phrasing imposes a temporal requirement—the "hit" must precede the "run." *Dancey* discussed only what constitutes the "hit" portion of the analysis; after finding that satisfied, it did not discuss the "run" component at all. Thus, under *Dancey*, a vehicle which in some sense starts a chain of events which later causes an accident (thus, according to *Dancey*, satisfying the "hit, or cause an object to hit" language of the policy), is assumed to constitute a "hit-and-run" vehicle. But that cannot be correct, as the facts of *Dancey* demonstrate.
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> * * * *
>
> Continuing one's driving under such circumstances, i.e., not stopping, is not flight or leaving the scene of an accident (as no accident has yet occurred) and thus does not fit the ordinary sense of running as used in the term "hit and run vehicle." By thereby putting the cart before the horse, *Dancey* converted the term "hit-and-run" into a new concept, "run-and-hit," because the later accident had the legal effect of turning the driving which preceded the accident into the running. *Dancey* simply labeled a truck which creates a dangerous condition short of an accident and which continues driving a "hit-and-run vehicle," where it is known with hindsight that an accident did actually occur. *Dancey* simply ignored or overlooked the fact that there must first be a "hit" and then a "run" in order for a vehicle to become a "hit-and-run" vehicle. By ignoring the "hit-and-run" requirement, *Dancey* violated the rule that "The language of insurance contracts should be read as a whole and must be construed to give effect to every word, clause, and phrase," *Mich Battery Equip, Inc v Emcasco Ins Co*, 317 Mich App 282, 284; 892 NW2d 456 (2016), by essentially reading the "run" requirement of "hit-and-run" out of the policy.
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> *Berry*, a case also cited by the dissent, demonstrates this point even more clearly. In *Berry*, a truck was hauling a load of scrap metal. At some point it

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[45] **Appendix C**, February 27, 2018 Court of Appeals Opinion and Order, Concurring Opinion

> stopped, and the driver got out and inspected the load. Between five and fifteen minutes later, at a spot about a half-mile from where the driver had stopped to inspect the truck, a fallen piece of metal caused an accident. *Berry*, 219 Mich App at 350. By that time, the truck had long since driven away. The *Berry* Court examined the facts and determined that "a substantial physical nexus between the hit-and-run vehicle and the object struck by plaintiff was established." *Id.* The *Berry* Court did not discuss at all whether or how the truck had "run" from what it determined was the "hit." Thus, even setting aside whether there was a basis for determining "a substantial physical nexus" between the truck and the plaintiff's vehicle, simply labeling the truck "the hit-and-run" vehicle where it continues driving and is gone from the scene of what later becomes an accident ignores the temporal requirement of a hit followed by a run. It is not hard to imagine a scenario such as in *Berry* in which a sharp piece of metal could lie on a rural road for days undiscovered and then cause an accident. Under those circumstances, labeling someone a "hit-and-run" driver for having driven days before, even if the driver had known about a part falling off, simply strains the term "hit-and-run" beyond a reasonable reading. See *Radenbaugh v Farm Bureau Gen Ins Co of Mich*, 240 Mich App 134, 138; 610 NW 2d 272 (2000) (stating that courts should avoid strained construction of insurance policies).

So the question in this case is, even assuming (1) there is a truck or trailer upon which the drywall was at one time loaded and (2) the drywall came off of that truck or trailer and (3) the plaintiff vehicle then struck the drywall, can there be a hit and run driver or a hit and run vehicle where there is absolutely no evidence that the operator of the truck had any knowledge of any accident?

In *Elliot Rutherford v. GEICO General Ins. Co.*,[46] the Court of Appeals recently held that for a vehicle to be involved in an accident, "it must actively, as opposed to passively, contribute to the accident" and "have more than a random association with the accident scene".

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[46]**Exhibit 9**, *Elliot Rutherford v. GEICO General Ins. Co.*,(Unpublished, Mich. Ct. App. Docket No. 329041, issued January 17, 2017), Slip Opinion

In *Rutherford*, *supra.*, the Court of Appeals stated:[47]

> At most, an unknown motor vehicle passively contributed to plaintiff's accident by depositing the debris in the road. Accordingly, plaintiff's injuries were only tangentially related to a motor vehicle, as there is no indication that a motor vehicle engaged in any activity that played a causal role in the accident. See *Detroit Medical Ctr*, 302 Mich App at 395-396.

Rutherford, supra., addressed the question of whether there was "the requisite causal connection between plaintiff's accident and a motor vehicle".

The determination in *Rutherford, supra.*, is on point with AAIC's position that the uninsured motor coverage does not apply to this accident circumstance because there is no "hit and run vehicle" involved. The contract language which defines "uninsured motor vehicle" requires that the vehicle actually be a "hit and run" vehicle.

> 3. "Uninsured motor vehicle" means a land motor vehicle or "trailer":
>
> * * * * *
>
> d. ***That is a hit and run vehicle*** . . . . (emphasis added).

The *conditio sine qua non* or essential condition in order to find coverage under paragraph 3.d. is that there actually be a hit and run vehicle. Because it is essential under both legal and common parlance that the person driving the alleged hit and run vehicle must know that there was a collision, there can be no "hit and run" driver or vehicle without demonstrating knowledge of the accident.[48] Because, in this case, there is no evidence whatsoever that the person driving the vehicle that dropped the drywall was aware of the ambulance hitting the drywall, there is no "hit and run" vehicle. Because there is no "hit

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[47]**Exhibit 9**, p. 4. A panel of this Court rejected the argument that tire debris in the roadway was enough to render a motor vehicle "actively involved" in the accident.

[48]Plaintiff may argue that the driver of the truck that allegedly dropped the drywall must have known that the drywall was dropped. Even if this were true, this is not the same as knowledge of the accident/collision.

and run" vehicle, there is no coverage.

RELIEF REQUESTED

For these reasons, Defendant-Appellee American Alternative Insurance Corporation respectfully requests that this Court **DENY** Plaintiff-Appellant's Application for Leave to Appeal, **AFFIRM** the Court of Appeals' February 27, 2018 decision, and remand for entry of Judgment in favor of AAIC. Alternatively, AAIC requests that this Court remand for entry of Judgment in favor of AAIC on the basis that no "hit and run" vehicle was involved.

Respectfully submitted,

kallas & henk pc

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Dated: May 7, 2018

PROOF OF SERVICE

I hereby certify that on May 7, 2018, I electronically filed Defendant/Appellee's Response Brief in Opposition to Plaintiff/Appellant's Application for Leave to Appeal to Supreme Court to the attorneys and parties of record with the Clerk of the Court using the Supreme Court **TrueFiling E-File and E-Serve** program.

/s/ Linda Pillsworth
Linda Pillsworth